STATE OF MICHIGAN

COURT OF APPEALS

MARY H. WINGARD, Personal Representative of the ESTATE of VERNON WINGARD,

Plaintiff-Appellant,

v

NUTRO CORPORATION and BLU-SURF, INC.,

Defendants-Appellees.

UNPUBLISHED
March 6, 2007

No. 262893
LC No. 01-40992-NP-3

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of No Cause of Action entered in this products liability action following a jury trial. We affirm.

This products liability action arises from a fatal accident in a manufacturing facility. Vernon Wingard was employed by Rotor Coaters, Inc. (RCI), a manufacturing facility that executes a paint process that rustproofs rotors for Delphi, which supplies them to General Motors for use in vehicle assembly. Wingard worked on the conveyor line known as Line No. 4, loading rotors onto machines. On November 16, 2000, Wingard was crushed to death in a workplace accident involving Line 4; the details of the machinery and the accident follow.

I. Background Facts and Procedural History

The basic process of the work on Line 4 involves two operators loading unfinished rotors at one end of a conveyor. The conveyor includes rows of four side-by-side stainless steel rods, and the rows are sixteen inches apart along the conveyor line. Each rod serves as a pedestal for a rotor, so the conveyor moves four rotors at a time through a finishing process. Two operators unload the finished rotors at the other end of the conveyor. The conveyor moves on a computer-controlled cycle 18 seconds long; every six seconds of movement is followed by 12 seconds when the conveyor is stationary. During the six seconds of movement, the conveyor advances approximately 16 inches, with a new row of rotors arriving at the end of the line.

In January, 2000, RCI contracted with defendant Nutro Corporation (Nutro) to design and install the brake rotor finishing system that became Line No. 4. Nutro asserts that at the time of contracting, RCI had not yet determined whether rotors would be removed from the line manually or automatically, and that placement or design of the guarding of the unload point was

therefore not part of the contract. The request for proposal issued by RCI in December, 1999, lists "System entrance and exit conveyors (if required)" in the Exclusions to the work scope. The acknowledgment of the purchase agreement for the project, sent to RCI by Ken Rumbaugh, Nutro's project coordinator, identified the list of Exclusions as "Work by Others: These items are not included in this order and must be furnished by RCI." This list again included "System entrance and exit conveyors (if required)."

Nutro contracted with defendant Blu-Surf for the installation, which Blu-Surf completed in June and July, 2000. The purchase order for Blu-Surf's services on the project describes the work as a "Fixed Contract for Mechanical and Electrical Labor to Install Brake Rotor Finishing System at RCI." The request for quotation sent by Nutro to Blu-Surf stated: "Nutro will have an 'On Site Supervisor' who will oversee and direct the entire Project." This supervisor, Jim Sackett, was present throughout the entire installation process.

Line 4 started producing parts in August of 2000 and was fully up and running in September. Plaintiff asserts that Nutro retained control of Line 4 until it was formally accepted as complete by the buyer, which did not happen until December 8, 2000. Nutro asserts that as of September, 2000, when the line was fully operational, Nutro no longer had any personnel on site and had turned over control.

The part of the machinery at issue here is the barrier guard at the unload station.[1] This guard was not included in the blueprints of the original design. George Wharton, engineering manager for Nutro, stated in his deposition that during the installation process Nutro had suggested installing a light curtain, which would prevent the machinery from moving if an operator reached inside it, as a barrier guard at the end of Line No. 4. According to Wharton, George Geglio, maintenance manager for RCI, declined the light curtain plan and indicated RCI would take care of the guarding issue. On July 30, 2000, Blu-Surf submitted directly to Geglio at RCI an invoice for work beyond the scope of the original purchase order with Nutro. The invoice stated "The following is a list of items which Blu-Surf completed per your request on your new rotor line"; line item (E) read "Supply & install safety guard at unload station." On September 8, 2000, Ken Rumbaugh, project leader for Nutro, returned the invoice with a handwritten note indicating that the safety guard line item should be billed directly to Nutro; Blu-Surf then invoiced Nutro. Rumbaugh testified that Nutro paid this invoice from Blu-Surf as part of an arrangement with RCI to wrap up some expenses as a condition precedent to receiving the final 10% of the total contract amount between RCI and Nutro, approximately $130,000.

According to Blu-Surf's installation supervisor, Richard Broek, the guarding on Line 4 was built "exactly like line 3." The barrier guard that Blu-Surf installed is a 38 inch high fence, constructed of channel iron, that wraps around three sides of the end of the line. According to

---

[1] This section of the machine, at the unload station, is known as a "pinchpoint" because of the way the moving conveyor and the stationary barrier intersect. At the point of narrowest clearance, the line of four stainless steel rods across the conveyor comes to a point 2 ½ inches from the barrier guard that was installed at the end of the line. The barrier guard is a 38 inch high fence, constructed of channel iron, that wraps around three sides of the end of the line.

Nutro, although the pinchpoint at issue here was approximately 2 ½ inches inside the barrier, it was actually approximately 20 inches below and behind the barrier, and so did not present an immediate risk of contact with operators. The guarding was in place for four months and finished rotors were produced along the conveyor for three months before Wingard's accident.

Various persons involved in the Line 4 project testified that they had believed the guarding was safe before the accident. RCI plant engineer Chet Hill, RCI maintenance supervisor Tony Geglio, Nutro engineering manager George Wharton, Nutro project manager Ken Rumbaugh, Blu-Surf installation supervisor Dick Broek all testified in depositions or at trial that they believed the guarding was safe.

According to Geglio, once Line 4 was up and running, it became a common occurrence for rotors to fall behind the barrier guard. The manual for users of the machine did not include instructions for the removal of fallen parts. However, employees working on Line 4 were instructed not to attempt to retrieve the parts, but to let RCI's maintenance personnel retrieve them. Hooks were fabricated to use for retrieval. These same hooks and the same process for contacting maintenance personnel for removal applied to the other production lines on the floor, as parts also fell and similarly presented no immediate issue for production.

Although production workers were instructed to have maintenance workers remove fallen parts, they were also instructed that if they did attempt to remove parts themselves, the process was to stop the conveyor line and then use a metal hook to retrieve fallen parts. Wingard was trained in the proper use of the machine, and was instructed that it was a violation of RCI's safety standards to reach into the machine. According to the trial testimony of co-worker Otonya Williams, employees were aware that violating this safety standard would result in immediate termination.

Williams testified that on November 16, 2000, during the morning four rotors had fallen behind the barrier guard at the unloading station where she was working. During a time gap in production, when the operators at the loading station would be at lunch, Williams left her station to find the hook to retrieve the parts. She testified that she asked Wingard, who had returned from his lunch break, if he knew where to find the hook. He said he did not, and then walked past her, bypassing the pause button and the emergency stop button, arrived at the unload station, and reached over the barrier guard into the machinery, apparently to retrieve the fallen rotors. Williams testified that in order to reach the fallen rotors over the guard, one has to reach so far into the machine that both feet leave the ground. When she saw Wingard in this position, with both feet off the ground, she ran over and pressed the pause button and the emergency stop button, and the machinery stopped moving. Despite this, Wingard was crushed to death.

Wingard had apparently reached into the machinery on prior occasions and been reprimanded and warned for doing so; maintenance worker Isaac Swilley and co-workers Reginald Cooper and Joe Stanton all testified to this, stating that they had warned Wingard of the obvious risk of injury or death.

Samples of Wingard's blood and urine were taken during the autopsy. These were tested by Michigan State Police Forensic Scientist Mark Vandervest, who found the presence of cocaine. Geoffrey French, also a Michigan State Police Forensic Scientist, conducted confirmation tests and found parent cocaine and three cocaine metabolites. Dr. Michelle Glinn,

supervisor of the Michigan State Police toxicology lab, reviewed and approved the scientists' reports. Dr. Glinn used the data compiled by the two tests to quantify the amount of cocaine in Wingard's system at the time of the accident. Dr. Glinn testified that some variability in the calculation was possible, the data dictated a particular range that circumscribed the amount of cocaine present. Dr. Glinn stated this was based on established scientific methodology.

On the day of the accident, MIOSHA investigated Line 4 and issued citations to RCI for two safety issues: the emergency stop buttons at the unload station had ring guards around them, and the conveyor had a pinchpoint area right at the unload station. RCI paid financial penalties and took remedial action on both issues. To guard the pinchpoint, RCI added a light curtain.

Plaintiff, decedent's surviving spouse, alleges that the accident proves three design defects: the movement of the spindles within 2-1/2 inches of the fixed barrier created a pinchpoint that pulled Wingard into the machinery; there was a practical way to design the machinery to avoid parts falling to the floor; defendant Nutro did not compensate for the defective design by providing for an acceptable, reasonable, and safe way to recover fallen parts. Plaintiff asserts that after the accident, changes were made that make it impossible to reach over the barrier to retrieve fallen parts. Plaintiff asserts that this means it is evident that the accident happened because the design permitted parts to fall behind the barrier.

Plaintiff filed a complaint against Nutro Corporation,[2] alleging product liability, negligence, and gross negligence. Nutro filed a notice of Non-Party at Fault, naming Blu-Surf, arguing that RCI contracted directly with Blu-Surf for the design, fabrication, and installation of the guard.[3] Plaintiff then amended her complaint to add Blu-Surf as a defendant, alleging that Blu-Surf installed guarding on the machine, was aware of the defect in the guarding, and undertook as the designer, manufacturer, and/or fabricator of the guarding to alter, modify, re-design, and change the original design in such a way that the probability of injury was increased. The complaint further included a count of product liability, alleging a violation of the duty to design, test, manufacture, and sell a product reasonably fit for foreseeable uses and free of defects.[4] Plaintiff further alleged that defendants violated MCL 600.2949a when they disregarded defects and were aware of existing safety devices which, if installed, would have prevented this accident.[5] Finally, plaintiff included a negligence count, alleging defendants were negligent in the design, testing, manufacture, installation, operation, sale, distribution, and maintenance of the product.

---

[2] The complaint initially included RCI and RCI's parent company as defendants, but claims against them were dismissed as a result of a settlement. The settlement amount was $150,000.

[3] Blu-Surf contends that it was at all times a sub-contractor to Nutro.

[4] Plaintiff admits that reaching into the machine was not the intended use, and was "foolish," but adds that designers and manufacturers have a duty to guard against reasonably foreseeable misuses.

[5] Plaintiff's expert Barnett testified as to three possible options that, if installed, would have allowed operators to safely remove parts.

Blu-Surf filed a motion for summary disposition, arguing that it was responsible for installation only, and was not the designer, manufacturer, or distributor of the rotor coater machine. Blu-Surf argued that while it did fabricate the barrier guard, it had no responsibility for the design of the guard, and cannot be liable for design defect. The circuit court heard arguments on the motion and granted summary disposition for Blu-Surf, finding that plaintiff "has presented no evidence to support the contention that Defendant Blu-Surf did anything other than build and install the barrier guard for the machine in question at RCI's request."[6]

As to Nutro, a four week jury trial was held between March 16 and April 8, 2005. On May 9, 2005, a judgment of No Cause of Action was entered. Plaintiff filed this appeal as of right.

II. Liability of Blu-Surf

Plaintiff first argues on appeal that the trial court erred in granting summary disposition to defendant Blu-Surf. Blu-Surf moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that it had no liability for any alleged product defect because it was an installer only and had no involvement in design of the product. The trial court agreed, finding there was "no evidence to support the contention that Defendant Blu-Surf did anything other than build and install the barrier guard for the machine in question at RCI's request." Plaintiff argues that because Blu-Surf fabricated the barrier guard as well as installing it, Blu-Surf became the designer/manufacturer rather than just the installer. We disagree.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(8) relies only on the pleadings, taking all factual allegations as true, and testing the legal sufficiency of the claim; summary disposition is proper where no factual development could support relief under the claim. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim, relying on pleadings, affidavits, depositions, and other documentary evidence; summary disposition is proper only where no genuine issue of material fact exists. *Id.* at 120.

It is undisputed that Blu-Surf fabricated and installed the guarding on Line 4: on July 30, 2000, Blu-Surf submitted directly to RCI an invoice for work beyond the scope of the original purchase order with Nutro; the invoice included as a line item: "Supply & install safety guard at unload station." The only factual dispute centers on who designed the guard.

Blu-Surf's installation supervisor, Richard Broek, stated in his deposition that Blu-Surf was not involved with the design of the guarding. RCI maintenance supervisor Tony Geglio stated in his deposition that he was the only person from RCI with any "input" into the design of the barrier guard. And he stated that the direction he gave "was just to make it safe or as safe as the machines, safer than the machines that we have in-house." It appears that Blu-Surf followed

---

[6] Plaintiff's expert, Ralph Barnett, testified in his deposition that he believed Blu-Surf had responsibility for installation only, and no involvement in any design work.

this direction and fabricated guarding modeled on the guarding on the other production lines. We find that completing the requested work does not impose liability on Blu-Surf for any alleged design defect.

We find dispositive the testimony of plaintiff's safety expert, Ralph Barnett, who indicated in his deposition that he did not believe Blu-Surf bore responsibility for the design of the guarding:

> Q: And as far as the person who was in charge out there for Blu-Surf, your understanding based on your review of the testimony, was Dick Broek, right?
> A: I think that's correct.
> Q: Are you aware of whether he had any training with regard to evaluating the safe design of the machines or the guardings?
> A: I'm under the impression that he had no training with respect to safety.
> Q: And you wouldn't have any criticisms of him, the fact that he didn't have training with regards to safety design of machines or guarding?
> A: No, no criticism.
> Q: You're not aware that he was contracted or Blu-Surf was contracted to design this machine in any way, are you?
> A: I'm under the impression they were only supposed to install it.
> Q: Well, do you have any criticisms of Blu-Surf?
> A: Nope.

Plaintiff argues that either Nutro or Blu-Surf must be responsible for the design of the guarding. Absent evidence to create a genuine issue of material fact as to Blu-Surf's accountability for the design of the guarding, however, summary disposition was properly granted. As the trial court correctly observed, mere speculation is insufficient to create a question of fact. *Hall v CONRAIL*, 462 Mich 179, 187; 612 NW2d 112 (2000).

III. Liability of Nutro

Plaintiff argues that the trial court should have determined, as a matter of law, that Nutro had a duty to design Line 4 in a manner that eliminated any unreasonable risk of harm, here meaning including adequate guarding at the unload point. *Ghrist v Chrysler Corp*, 451 Mich 242, 248; 547 NW2d 272 (1996). Plaintiff argues the trial court erred in determining that whether Nutro had a duty to guard Line 4 was a question for the jury of interpretation of the contract between Nutro and RCI. Again, we disagree.

This Court's review of a trial court's conclusions of law is de novo. *Alan Custom Homes Inc v Krol*, 256 Mich 505; 667 NW2d 379 (2003).

The trial court first considered this issue well before the trial started in March, 2005. Defendant filed a motion for summary disposition of the issue of duty to guard line 4, and arguments were heard on the motion on April 12, 2004. The trial court issued a written opinion on May 27, 2004, denying the motion and stating:

> As a result of such conflicting evidence and testimony, the court finds a genuine issue of material fact regarding the duty to guard conveyor line four pursuant to a

contract entered into between Nutro and RCI and leaves this issue for the fact finder.

The conflicting evidence and testimony related to whether the contract exclusion of an "unload conveyor" also excluded guarding at the unload station. The contract between RCI and Nutro specifically excluded "System entrance and exit conveyors (if required)"; this line item was included in the list of Exclusions labeled "Work by Others: These items are not included in this order and must be furnished by RCI." George Wharton, engineering manager for Nutro, stated in his deposition that during the installation process he suggested installing a light curtain, which would prevent the machinery from moving if an operator reached inside it, as a barrier guard at the end of Line No. 4. He produced evidence that he had obtained pricing information in order to quote this as a separate project. However, Wharton stated that Geglio, maintenance manager for RCI, declined the light curtain plan and stated that RCI would take care of the guarding issue.

Upon de novo review, we agree with the trial court that the conflicting evidence establishes a question of material fact "regarding the duty to guard conveyor line four pursuant to a contract." However, that question went to the jury, and the jury decided Nutro was not negligent.

Where design defect is alleged, Michigan courts apply "a pure negligence, risk-utility test in products liability actions against manufacturers of products." *Prentis v Yale Mfg Co*, 421 Mich 670, 691; 365 NW2d 176 (1984). This test "questions whether the design chosen renders the product defective, i.e., whether a risk-utility analysis favored an available safer alternative. In such a complaint, the focus of any duty begins with whether the product was defective when it left the manufacturer's control." *Gregory v Cincinnati Inc*, 450 Mich 1, 11-12; 538 NW2d 325 (1995).

The specifications of the product here are outlined in the contract. Because the conveyor line designed by Nutro is a one-of-a-kind, custom-built product, the scope of work and specifications were the result of negotiation and contract between buyer and seller. It is simply not the same as products made in bulk for purchase by multiple buyers. And there is no allegation that the conveyor line itself was defective. It is the guarding, designed by RCI and fabricated and installed by Blu-Surf, that is allegedly defective or dangerous.

Even if Nutro should be held accountable for failure to include a safety device that was not included in the scope of work, and given that their suggested safety add-on was expressly rejected by RCI, still the omission of an effective safety device might not result in liability here.

> [A] prima facie case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injuries sustainable from such an accident. It secondly requires a showing of alternative safety devices and whether those devices would have been effective as a reasonable means of minimizing the foreseeable risk of danger. [*Cacevic v Simplimatic Eng'g Co*, 248 Mich App 670, 680; 645 NW2d 287 (2001); *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 757-758; 593 NW2d 219 (1999); *Gregory v Cincinnati Inc*, 450

Mich 1, 13; 538 NW2d 325 (1995) quoting *Reeves v Cincinnati, Inc*, 176 Mich App 181, 187-188; 439 NW2d 326 (1989)]

As to the first element, the magnitude of risk, clearly the severity of possible injuries weighs heavily, but the likelihood of this type of accident seems much less weighty. The conveyor line apparently worked for four months without incident. And Wingard's co-worker, Otonya Williams, testified that reaching into the machinery to retrieve fallen parts was not a simple matter:

> Q: If this [the barrier guard] is about 38 inches, you've got to reach over, reach down, and you've got to put your body about waist over and reach into the machine, don't you?
> A: Correct.
> Q: Do your feet leave the ground?
> A: Yes.
> Q: Both feet?
> A: Yes.
> . . .
> Q: So your head's inside?
> A: Yes.
> Q: Behind the barrier guard?
> A: Yes.
> . . .
> Q: And when you looked over and saw Mr. Wingard, that's how he was. He was reaching in there, his waist was leaning on top of the guarding, feet are in the air, and he's reaching down on the ground?
> A: Yes.

Plaintiff's safety expert, Ralph Barnett, also testified at trial that Wingard's action was unsafe:

> Q: Mr. Wingard would have to have put over his head below that 38 inches [of the barrier guard], on the other side of the guard and below it –
> A: Yes.
> Q: -- is that true?
> A: Right.
> Q: That's not safe in anybody's book, is it?
> A: No, no, no.

As to the second element, alternative design options, although plaintiff asserts that changes to the machine have corrected the problem, there is testimony that parts continue to fall, and still have to be retrieved, despite the safety upgrades. Presumably, if one wanted to climb into the machine to remove the parts, one could still do so. The difference now is that the light curtain would bring the machine to a stop. Had RCI agreed to the safety device suggested by Nutro, a light curtain would have been in place before Wingard leaned into the machine.

Plaintiff further argues that the trial court erred in denying its motion for a directed verdict on the issue of the duty to guard Line 4. We note first that plaintiff's reliance on alleged

admissions made by Nutro fails because it relies on mischaracterizations of statements taken out of context, rather than on valid admissions.

In addition, plaintiff's argument is premised on the determination that the product at issue was dangerous, and that defendant therefore breached its duty to design its products to eliminate any unreasonable risk of harm. *Ghrist v Chrysler Corp*, 451 Mich 242, 248; 547 NW2d 272 (1996). Notwithstanding the accident that occurred, however, it is not entirely clear that the product Nutro designed "was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller." MCL 600.2946(2).

Although the light curtain would have been a safer alternative, as it would have prevented the machine from moving if an operator climbed in, it does not follow that the barrier guard built and installed by Blu-Surf was not reasonably safe. As defendant observes, case law holds that manufacturers are not insurers that no injury will ever result from use of their products. *Owens v Allis-Chalmers Corp*, 414 Mich 413, 432; 326 NW2d 372 (1982).

Line 4 was guarded with a barrier guard built to mirror those guarding the other production lines at RCI. RCI, Nutro, and Blu-Surf employees who worked on the project all testified that they believed the guarding was safe, until the accident occurred. In addition, safety expert Jack Schuldt, who had been retained by RCI to evaluate the safety of their machines after Wingard's accident, testified at trial that there was "[n]o doubt in [his] mind" that the guarding on line four at the time of the accident was "safe and adequate."

Plaintiff asserts that the accident resulted directly from the design defect that allowed parts to fall behind the barrier guard. However, a process was available to retrieve parts safely, and according to the testimony of Wingard's co-workers, everyone was aware of that process and he had been warned specifically of the dangers of reaching into the machine rather than using the hook. In addition, the remedial safety measures taken to guard line four after the accident have not stopped parts from falling.

There is also some question as to who had control of Line 4 at the time of the accident. Plaintiff asserts that Nutro was still in formal control of Line 4 until it was formally accepted as complete by the buyer, which did not happen until December 8, 2000. Nutro asserts that as of September, 2000, when the line was entirely debugged and fully operational, Nutro no longer had any personnel on site and had turned over control. Given the differing testimony on this issue, it seems the trial court properly did not direct a verdict as to control of the line at the time of the accident.

IV. MIOSHA Evidence

Plaintiff argues that the trial court erred in excluding evidence of MIOSHA standards and expert testimony that would rely on MIOSHA standards as industry safety standards.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005).

Defendant filed a pre-trial motion to exclude any references to MIOSHA standards or the MIOSHA citations issued to RCI after the accident. The trial court granted the motion, and

excluded references to the citations and the standards, which would have formed the basis of MIOSHA inspector James Brusen's opinion that the guarding was unsafe.

As a threshold matter, case law supports the general premise that evidence of safety standards may be admissible at trial. *Coger v Mackinaw Products Co*, 48 Mich App 113, 126; 210 NW2d 124 (1973); *Gregory v Cincinnati, Inc*, 202 Mich App 474, 479; 509 NW2d 809 (1993). However, case law also suggests that MIOSHA regulations do not apply to manufacturers such as Nutro is in this matter:

> Next, plaintiff argues that defendants "assumed a duty" to comply with the regulations of the Occupational Safety and Health Act (MIOSHA), MCL 408.1001 et seq.; MSA 17.50(1) et seq., when they considered MIOSHA regulations in designing dies. Plaintiff further argues that admission of the standards was necessary to establish defendants' breach of duty. We disagree. MIOSHA regulations are applicable to employers and employees only. [*Davis v Link, Inc*, 195 Mich App 70, 73; 489 NW2d 103 (1992), citing *Zalut v Andersen & Associates, Inc*, 186 Mich App 229, 235; 463 NW2d 236 (1990).]

MIOSHA speaks directly to the "statutory rights, duties, or liabilities of employers and employees." MCL 408.1002(2). It does not, at any point, speak to duties of third-parties, and does not appear to have been applied to third-parties in prior case law. Only *Davis* squarely addresses admissibility of MIOSHA standards against a defendant who is neither an employer nor an employee.

The trial court's ruling did not preclude admission of other industry safety standards, for example American National Standards Institute (ANSI) standards.[7] In fact, the trial court asked counsel, before the examination of safety expert Jack Schuldt began, whether ANSI standards would be involved in the witness' testimony. However, none of the expert witnesses relied on ANSI or any other standards as a basis for their trial testimony.

---

[7] In a factually similar products liability action, *Cacevic v Simplimatic Eng'g Co*, 248 Mich App 670, 677-678; 645 NW2d 287 (2001), plaintiff's expert witness relied on ANSI standards to establish the inadequacy of guarding on a machine:

> He testified that the mesh guard provided by defendant was "totally inadequate" because it did not conform to the safe distance aspect of guarding, meaning that the guard was not positioned in such a way that it would prevent a person from placing a hand through the opening into the hazardous area of the palletizer. On the basis of his examination of the equipment, Glasgow testified that because there was no adequate, protective guarding in place when Lena's accident occurred, the palletizer did not conform to the American National Standards Institute Committee (ANSI) standards for guarding that existed at the time the palletizer was designed and that defendant did not use reasonable and diligent care to eliminate a reasonably foreseeable risk of harm (i.e., injuring a hand while trying to clear a jam).

Although we are not entirely convinced that MIOSHA standards should never be admissible as examples of industry safety standards, even against third-party manufacturers of equipment sold to employers for use by employees, we cannot say that excluding evidence of MIOSHA standards was an abuse of the trial court's discretion where case law indicates those standards are not admissible, and where the parties were free to rely on other industry safety standards.

V. Cocaine Evidence

Plaintiff next argues that the trial court erred in allowing evidence of cocaine and cocaine metabolites in Wingard's system at the time of his death.

In this case the jury was instructed to decide specific questions rather than to deliver a single verdict. The jury first considered the question of whether Nutro was negligent, and they answered that Nutro was not negligent. Any evidence of Wingard's drug use or general behavior was not relevant to that question. Although the information that Wingard had cocaine and cocaine metabolites in his blood at the time of the accident seems highly prejudicial, it cannot be directly correlated to the decision the jury reached. The issue of the blood evidence was not dispositive, and we need not address it here.

VI. Notice of Non-Party Fault

Finally, plaintiff argues that the trial court erred in refusing to strike Nutro's notice of non-party at fault naming RCI. This Court's recent decision in *Kopp v Zigich*, 268 Mich App 258; 707 NW2d 601 (2005), is the most current applicable case law. In *Kopp*, this Court held that an employer can be noticed as a non-party at fault pursuant to MCL 600.2957.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper